Wildlife and Wildlife Habitat

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Wildlife Training Topics

- Wildlife challenges
- Laws that protect wildlife
- Protected wildlife species
- Wildlife specs
- Miscellaneous wildlife considerations
- Inspector responsibilities
Wildlife Challenge: Mobility

- **Scoping** may not reveal all mobile protected wildlife
- Specs may not equal compliance if regulated wildlife **unexpectedly appear** on a project (be aware; call the REC)

Bird examples

Birds nest just about everywhere...
3 Additional Situations to Remember

(1) Biological resources are more than fish

(2) Everything is connected to everything else

*(1st Law of Ecology, Barry Commoner)*

*Butterfly Effect*
3 Additional Situations to Remember

(1) Biological resources are more than fish
(2) Everything is connected to everything else
   (1st Law of Ecology, Barry Commoner)
(3) Just because you can doesn’t mean you should

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Standard Wildlife Spec

00290.36 Protection of Wildlife and Wildlife Habitat

- Comply with the laws* of the Oregon Department of Fish and Wildlife (ODFW) and U.S. Fish and Wildlife Service (USFWS)
- Conduct operations to avoid any hazards to the safety and propagation of wildlife
   (This requires the contractor to plan ahead and the inspector to be alert.)

*We will only discuss laws that most impact transportation projects
Boilerplate Wildlife Special Specs

00290.36 Protection of Wildlife and Wildlife Habitat

- 00290.36(a) Migratory Birds
- 00290.36(b) Bats
- 00290.36(c) Avoid Nesting
- 00290.36(c) Prevent Nesting
- 00290.36(d) Wildlife Avoidance/Harassment (High Noise)

Birds are the focus because they can be on every project.

Migratory Birds (3 primary laws in Oregon)

1. Endangered Species Act  
   (ESA; includes species other than birds; 6 federal-listed species; 8 state-listed species)

2. Migratory Bird Treaty Act  
   (MBTA; >500 species)

3. Bald and Golden Eagle Protection Act  
   (BGEPA; 2 species)

Don’t hurt a bird!!
Environmental Construction Inspector

December 2018

Wildlife

### Actions Prohibited w/o Permit

<table>
<thead>
<tr>
<th>Action</th>
<th>ESA</th>
<th>MBTA</th>
<th>BGEPA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Birds (move, harm, kill)</td>
<td>P</td>
<td>P</td>
<td>P</td>
</tr>
<tr>
<td>Birds (harass, disturb)</td>
<td>P</td>
<td>Call REC</td>
<td>P</td>
</tr>
<tr>
<td>Eggs (move, harm, kill)</td>
<td>P</td>
<td>P</td>
<td>P</td>
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<tr>
<td>Active* nests (move, destroy)</td>
<td>P</td>
<td>P</td>
<td>P</td>
</tr>
<tr>
<td>Inactive nests (move, destroy)</td>
<td>P</td>
<td>A</td>
<td>P</td>
</tr>
<tr>
<td>Habitat (alter, destroy)</td>
<td>Call REC</td>
<td>Call REC</td>
<td>Call REC</td>
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*Active Nest = has eggs or flightless young

P = Prohibited
A = Allowed

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### What is ODOT’s MBTA Compliance Strategy?

- MBTA Highway Directive
- USDA APHIS-WS (United States Department of Agriculture, Animal and Plant Health Inspection Service, Wildlife Services)
- MBTA Miscellaneous Special Purpose Permit
- Project Special Specifications
MBTA is a “strict liability law”

This means that a party can be convicted under the statute without demonstration of specific intent or guilty knowledge.

This means YOU!!

ODOT MBTA Highway Division Directive

- Provides agency personnel with guidelines and strategies to ensure that appropriate and reasonable measures are taken to prevent injury to and death of migratory birds

- All employees must “practice due diligence to safeguard migratory birds while carrying out employment duties”
A pause for…

Incidental Take and the M-Opinions

- **Incidental Take** – take that is incidental to a lawful activity; disputed under the MBTA
- **M-Opinions** – official opinions from the Department of the Interior (DOI) Solicitor’s Office that carry substantial weight in how DOI applies and enforces its wildlife laws
Incidental Take and the M-Opinions

- **M-37041** (10 Jan 2017) – The MBTA’s broad prohibition on taking and killing migratory birds by any means and in any manner includes incidental taking and killing.
- **M-37050** (22 Dec 2017) – Incidental take does not violate the MBTA.
- **8 State Civil Action** (5 Sept 2018) against M-37050 includes Oregon

M-37050 and ODOT Projects

- **M-37050** (22 Dec 2017) – Take only applies to affirmative (assenting/knowing) actions that have as their purpose (intention) the taking of migratory birds/nests/eggs
What Does This Mean for ODOT?

No change in procedures:
- Prevent nesting
- Avoid injury

Purposeful (knowing) take ≠ Incidental take

And Now Back To Our Regularly Scheduled Program
Transportation MBTA Violation Example

- Oklahoma 2012 bridge repair
- 818 cliff swallow eggs destroyed
- Contractor fined $372,750 (non-prosecution agreement)
- 1 employee pled guilty to 1 count of scraping down a nest with 1 egg (given 3 months probation and 10 hours of community service)

290.36(a) Migratory Birds

- Comply with the MBTA which protects most species of birds in Oregon
- Do not remove or disturb nests containing eggs and dependent young (i.e., active nest)
- Do not disturb the surface the active nest is built on
290.36(a) Migratory Birds (cont.)

- If migratory bird nests are encountered that contain eggs or dependent young, stop all actions that may disrupt the nest (including noise and visual) and contact the Engineer.
- Do not resume work that may disrupt nesting until approved by the Engineer.

ODOT MBTA Permit
(based on Hwy Directive and due diligence to protect)

- ODOT biological staff are authorized to take birds
- If APHIS-Wildlife Services is contracted for bird management, APHIS is authorized to take birds
- Private contractors and Local Governments are not authorized to take birds (except by special permission)

ODOT and WSDOT are the only DOTs with a statewide programmatic MBTA permit.
ODOT MBTA Permit (cont.)

- **NOT** a “get out of jail for free” permit
- Has very **limited take** (i.e., “prohibited actions”) authorization
- Requires tracking and **reporting** of take to ODOT Wildlife Program lead

<table>
<thead>
<tr>
<th>Project Type</th>
<th>Permit Holder</th>
<th>Take Authorization</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Typical ODOT</td>
<td>ODOT</td>
<td>ODOT Biological Staff &amp; APHIS</td>
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<tr>
<td>2 Atypical ODOT</td>
<td>ODOT</td>
<td>Contractor’s Biologist (w/permission)</td>
</tr>
<tr>
<td>3 Typical Local Gov</td>
<td>ODOT</td>
<td>ODOT Biological Staff &amp; APHIS</td>
</tr>
<tr>
<td>4 Atypical Local Gov</td>
<td>Local Gov</td>
<td>???</td>
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Typical ODOT & Local Gov Situation

SP290.36(a) Migratory Birds

- Bird management activities will be performed by the Agency (i.e., ODOT Biological staff or USDA APHIS-Wildlife Services [not a regulatory agency])

- Ensure that Agency and its permitted agents have access to the project areas as needed to prevent migratory bird nesting (i.e., harassment & exclusionary devices)

- Notify the Engineer, in writing, a minimum of 10 calendar days prior to starting activities that could harm nesting birds (should have been discussed during design)

SP290.36(a) Migratory Birds (cont.)

- Avoid disturbing migratory bird nesting habitat (shrubs, trees, structures) from March 1 to September 1 of each year.*

- If avoidance is not possible, obtain approval from the Engineer before falling trees or clearing vegetation that could disturb migratory bird habitat between March 1 and September 1.

*Vegetation clearing often occurs under separate contract
Atypical Use of the ODOT MBTA Permit

- When the project is of such magnitude or complexity that neither ODOT Biological staff nor APHIS-Wildlife Services is able to oversee bird management
- Contractors (with Environmental Resources Unit Manager pre-approval) may be tasked with the work
- More detailed specifications are required

Atypical ODOT Situation

SP290.36(c) Prevent Nesting

Submit a migratory bird protection plan for review and approval at least 10 calendar days before pre-construction conference and include:

- List of qualified biologists
- Exclusionary measures/harassment methods
- Exclusionary measures implementation/inspection schedule...
- In the event the Contractor fails to prevent nesting of native birds, the Engineer may suspend work according to 00180.70
3 Methods to Prevent Nesting

- Deny access
- Harass
- Remove inactive nests

SP290.36(c) Prevent Nesting

a) Deny access - Physical barriers

- Mesh
- Spikes
- Nets
SP290.36(c) Prevent Nesting

b) Harass - Visual, auditory

- Reflector tape
- Noise cannon
- Decoy
- Kite

SP290.36(c) Prevent Nesting

c) Remove **inactive** nests as they are being built...

- Paintballs
- Poles
- Scrapers
SP290.36(c) Avoid Nesting

Submit a **migratory bird protection plan** for review and approval at least 10 calendar days before pre-construction conference and include:

- Measures to **avoid** disturbance to migratory bird **nesting habitat** from March 1 to September 1
- In the event nesting birds are encountered during construction, the **Engineer may suspend work** according to 00180.70

It's all about **timing** and **location** *(no work zone)*
SP290.36(d) Wildlife Avoidance/Harassment

(High Noise – mostly for ESA and BGEPA)

Examples

- Non-blasting high noise [as defined in specs] producing construction activities are not allowed between [date] and [date].

- Non-blasting high noise producing construction activities conducted from [date] to [date] shall implement a daily limited operating period of daytime work being conducted from 2 hours after sunrise to 2 hours before sunset.

SP290.36(x) Wildlife Avoidance/Harassment

(Sight Distance – mostly for ESA and BGEPA)

Example:

Minimize visual activity within 0.25 miles of suitable open sand beach nesting habitat during the snowy plover nesting season from March 1 to August 15.
Atypical Local Gov’t Situation

If a Local Gov’t uses its own MBTA Permit

- Local Government MBTA permit conditions may differ from the ODOT permit
- Contractors and Local Government personnel may be authorized to take birds not just APHIS-Wildlife Services
- Know the terms and conditions of the specific MBTA permit that covers the project

Local Gov MBTA Special Spec Example

00290.36(a) Migratory Birds

Bird management activities to comply with the MBTA will be performed by Washington County and its permitted agents as documented in the Washington County MBTA permit. Ensure that Washington County and its permitted agents have access to the project area…

NOTE: The specific MBTA permit conditions may not be directly stated in the specs.
**Remember:** Everything is connected to everything else…

Once there was an old bridge and its replacement was being constructed…

And then birds nested on the old bridge…and its demolition was delayed…and an In-Water Work Extension had to be requested…and…and…

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**The Good Samaritan**

Note: A permit is not needed to assist an injured bird (but you can’t bring it home); contact USFWS Enforcement (not OSP)
Any Bird Questions?

There are **no specific laws** that protect bats in Oregon.

ODOT protects bats and enhances their habitats to help prevent them from being listed under the ESA.
290.36(b) Bats

Avoid destruction of bat colonies as shown [on plans if known].

APHIS is usually contracted to deal with bats.

Unexpected Bats?
Call the REC!
SP290.36(b) Bats

- Schedule bridge demolition outside of the bat breeding season [date to date]. *(Hibernation period is also important, but few projects at that time.)*

- If this is not feasible and if approved by the Project Manager, apply exclusionary methods prior to this date to exclude bats from accessing suitable habitat...

2015 Region 3 Bat Bite Incident
Special Wildlife Situations

Project Specific Specials

Bat Habitat Plans – Crevices

Dimensions and locations are critical
**Bat Habitat Plans – “Caves”**

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**Marine Mammals***  
*(seals, whales, dolphins, otters, walruses)*

- **Marine Mammal Protection Act** (MMPA)
- **Endangered Species Act** (ESA)

*Up to the Bonneville Dam*

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Contact the REC immediately if you see a marine mammal

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Other Protected Terrestrial Animals

- **Mammals** (e.g., wolf, wolverine)
- **Amphibians** (e.g., Oregon spotted frog)
- **Invertebrates** (e.g., certain butterflies, fairy shrimp)

*If these species will be impacted, work restrictions will be project specific.*

**Wildlife Passage**

*Species/location specific*
Inspector Responsibilities

- Be on the lookout for **signs of wildlife** and think ahead
- Remember that **everything is connected** to everything else (*1st Law of Ecology*)
- By law everyone (*this means you*) must protect migratory birds
- Know which MBTA permit is in use and if APHIS-Wildlife Services is involved
- Leave wildlife decisions to the specialists (*Call the REC*)
...and thank you